

No. 47485-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

John Gardner,

Appellant.

Grays Harbor County Superior Court Cause No. 13-1-00313-1

The Honorable Judge F. Mark McCauley

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ISSUES AND ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Gardner's motion to suppress.
2. The trial court erred by admitting into evidence items obtained in violation of Mr. Gardner's right to be free from unreasonable searches and seizures under the Fourth Amendment.
3. The trial court erred by admitting into evidence items obtained in violation of Mr. Gardner's right to privacy under Wash. Const. art. I, § 7.
4. The trial court erred by concluding "this fits right in the criteria that [the cases] are talking about; no criminal history, no drug use, no monetary gain, et cetera, and it fits to a T right in there."

ISSUE 1: A search warrant must be based on probable cause. Was the search warrant here issued without probable cause?

ISSUE 2: An informant's tip cannot establish probable cause absent facts showing the informant's reliability. Did the search warrant affidavit fail to establish the anonymous informant's reliability?

ISSUE 3: An arrest warrant only justifies entry into a home when there is probable cause to believe that the person named in the warrant resides there and is actually present at the time of entry. Did the police lack probable cause to believe that Mr. Gardner lived at and was actually present at the residence at the time they entered to search for him?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

An informant told police that John Gardner possessed methamphetamine in his bedroom at 1400 West First Street in Aberdeen. CP 15-16. The informant “wishe[d] to remain anonymous.” CP 16.

The informant was known to Grays Harbor Sheriff’s Deputy Kevin Schrader, but had no track record providing accurate information to police. CP 15-17.¹ The informant told Schrader that she or he had seen methamphetamine on a table in Gardner’s upstairs bedroom within the past five days. CP 16. The informant concluded that Mr. Gardner was dealing drugs based on frequent short-stay traffic. CP 16.

The informant claimed familiarity with methamphetamine based on past friendships with others who used the drug, and from attendance at drug and alcohol classes. CP 16. No information was provided about the reason the informant attended drug and alcohol classes. CP 15-17.

Schrader did not conduct surveillance or take any steps to confirm that Mr. Gardner currently lived at the First Street address. CP 15-17. Instead, he checked for warrants and “discovered that [Mr. Gardner] was a convicted felon and DOC active.” CP 16. A conversation with a CCO revealed that Mr. Gardner had previously lived at the First Street address,

¹ According to Schrader, the informant had no criminal history, was not working for monetary gain, and was not working off any criminal charges. CP 16.

but had moved several months earlier. In fact, he was currently listed as transient, had an active warrant for failure to report, and his location was “unknown by DOC.” CP 17.

Based on this information, Schrader obtained a search warrant for the First Street address. CP 11-12. No effort was made to ensure that Mr. Gardner was on the premises when officers went to serve the warrant. CP 41. They found the front door open, went inside, and arrested Mr. Gardner. CP 41-42. A search revealed methamphetamine, and Mr. Gardner was charged with possession. CP 1, 42.

Mr. Gardner moved to suppress the items seized as evidence. CP 5. After reviewing the affidavit and hearing argument, the trial court denied the motion. According to the court, “this fits right in the criteria that [the cases] are talking about; no criminal history, no drug use, no monetary gain, et cetera, and it fits to a T right in there.” RP (5/19/14) 12.

Mr. Gardner was convicted on stipulated facts, and he appealed. CP 33-46, 52-60, 61.

ARGUMENT

THE SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE BECAUSE THE AFFIDAVIT DID NOT ESTABLISH THE ANONYMOUS INFORMANT’S RELIABILITY.

Washington uses the two-pronged *Aguilar-Spinelli*² standard to evaluate information from an informant. *State v. Ollivier*, 178 Wn.2d 813, 850, 312 P.3d 1 (2013) *cert. denied*, 135 S.Ct. 72 (2014). Where a citizen informant’s identity is known to police but not disclosed to the issuing magistrate, the state constitution “requires a heightened showing of credibility.” *State v. Atchley*, 142 Wn. App. 147, 162, 173 P.3d 323 (2007).

Where a search warrant affidavit fails to establish reliability, police may cure the deficiency through corroboration discovered by independent police investigation. *State v. McCord*, 125 Wn. App. 888, 893, 106 P.3d 832 (2005). However, the investigation must verify more than innocuous or public facts. *Id.*

Here, Deputy Schrader’s affidavit failed to establish the reliability of the anonymous informant. The informant had no track record, performed no controlled buys, made no declarations against penal

² *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

interest,³ and refused to be named in the affidavit. CP 15-17.

This stands in contrast to other cases where courts have found reliability. *Cf. State v. Chamberlin*, 161 Wn.2d 30, 42, 162 P.3d 389 (2007) (noting that the informant’s “statement against penal interest is buttressed by his willingness to publicly stand by his information”).⁴

Nor did Schrader’s independent investigation reveal more than publicly available facts: that Mr. Gardner had once lived at the address, that he had a DOC warrant for his arrest, and that his criminal history included drug convictions. CP 16-17. Notably, Schrader did not attempt a controlled buy, and did not even make any efforts to confirm that Mr. Gardner actually still lived at the First Street address. CP 15-17.

The affidavit failed to establish the unnamed informant’s reliability. It did not establish probable cause for issuance of a search warrant. Accordingly, the search warrant should not have issued, and cannot provide the basis for the entry into the home. *Ollivier*, 178 Wn.2d at 850.

³ The informant’s reference to drug and alcohol classes and claim to have only second-hand knowledge of drugs suggests the possibility that she or he actually misled the officer regarding personal drug involvement. The affidavit does not indicate that the informant denied using all drugs. The trial court’s oral finding that the informant had “no drug use” is not supported by the affidavit and should be disregarded.

⁴ *See also, e.g., State v. Davis*, 176 Wn. App. 385, 396, 308 P.3d 807 (2013) *review denied*, 179 Wn.2d 1023, 320 P.3d 719 (2014) (noting that “successful controlled buys may themselves be sufficient to establish the informant’s reliability”) (quoting *State v. Casto*, 39 Wn. App. 229, 233, 692 P.2d 890 (1984), *review denied*, 103 Wn.2d 1020 (1985)).

For the same reason, the purported arrest warrant⁵ does not provide a basis for upholding the trial court's decision. An arrest warrant may justify entry into a home, but only if there is probable cause to believe the person named in the warrant is an actual resident of the home. *State v. Ruem*, 179 Wn.2d 195, 201, 313 P.3d 1156 (2013). Furthermore, "the constitution also requires probable cause to believe that the subject of the arrest warrant is actually present *at the time of entry*." *Id.*, at 203 (emphasis in original).

Because of the lack of information establishing reliability, the unnamed informant's tip did not provide probable cause to believe that Mr. Gardner resided at the First Street address. Nor was there any information showing that Mr. Gardner was present at the time police entered the house to serve the arrest warrant. CP 41-42. The arrest warrant does not justify the officers' entry into the home under these circumstances. *Id.*

CONCLUSION

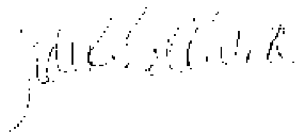
The search warrant was not supported by probable cause. The affidavit failed to establish the reliability of the unnamed informant, and police investigation revealed no more than publicly available facts.

⁵ The prosecution did not submit a copy of an arrest warrant to the trial court, and did not rely on the arrest warrant at the suppression hearing. CP 20-24; RP (5/19/14) 3-12.

Mr. Gardner's conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice.

Respectfully submitted on September 8, 2015,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

John Gardner, DOC #939710
Cedar Creek Corrections Center
PO Box 37
Littlerock, WA 98556

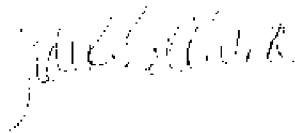
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Grays Harbor County Prosecuting Attorney
ksvoboda@co.grays-harbor.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 8, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

September 08, 2015 - 3:32 PM

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